

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-5036

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

No. 77-5036

IN RE EASTERN FREIGHT WAYS, INC., *Bankrupt,*
SIDNEY B. GLUCK, Trustee in Bankruptcy of EASTERN FREIGHT
WAYS, INC., *Plaintiff-Appellee,*
— against —

SEABOARD SURETY COMPANY, *Defendant-Appellant,*
MANUFACTURERS HANOVER TRUST COMPANY, individually and
as agent for other institutional lenders, INTERNATIONAL HARVES-
TER CREDIT CORPORATION, FRUEHAUF CORPORATION
and THE CHASE MANHATTAN BANK, NATIONAL ASSOCIA-
TION, and THOMAS J. CAHILL, Trustee in Bankruptcy of ASSO-
CIATED TRANSPORT, INC.,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT-APPELLEE
THE CHASE MANHATTAN BANK, National Association

MILBANK, TWEED, HADLEY & McCLOY
Attorneys for Defendant-Appellee
The Chase Manhattan Bank,
National Association
1 Chase Manhattan Plaza
New York, N. Y. 10005

Of Counsel:

RUSSELL E. BROOKS
TONI C. LICHSTEIN



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TION, and THOMAS J. CAHILL, Trustee in Bankruptcy of ASSO-
CIATED TRANSPORT, INC., *Defendants-Appellees.*

BRIEF OF DEFENDANT-APPELLEE
THE CHASE MANHATTAN BANK, National Association

Issues Presented for Review

The issues presented for review which relate to ap-
pellee The Chase Manhattan Bank, National Association
("Chase") are:

1. Did the District Court correctly decide that de-
fendant Seaboard Surety Company ("Seaboard") may
not solicit set offs of freight charges owed to its insured
by the amount of cargo claims asserted under Sea-
board's bonds before Seaboard has exhausted available
proceeds from Chase's letter of credit given to Sea-
board by its insured as collateral?

2. Did the District Court correctly decide that the Bankruptcy Court has summary jurisdiction to determine the legal availability of the proceeds of the letter of credit?

3. Does the Bankruptcy Court have jurisdiction to order a refund to Chase of excess proceeds under the letter of credit?

Statement of the Case

Plaintiff, the Trustee of Eastern Freight Ways, Inc. ("Eastern"), commenced this adversary proceeding in the Bankruptcy Court on November 3, 1976. The complaint pleads three causes of action (A.* 257). The first cause of action seeks a declaratory judgment that Seaboard could not invite Eastern's customers to set off freight charges owing to Eastern against cargo claims that the customers were asserting against Eastern and which were covered by Seaboard's bonds, because of Eastern's prior assignment of accounts receivable to defendant Manufacturers Hanover Trust Company ("Manufacturers") and others. A second cause of action was dismissed by the Bankruptcy Judge and is not the subject of appeal. The third cause of action alleges that a controversy exists as to the proper use of the proceeds of Chase's letter of credit in the amount of \$2,000,000 which Eastern procured from Chase and delivered to Seaboard to secure bonds written by Seaboard on behalf of Eastern. In that cause of action, plaintiff seeks a declaratory judgment that (a) the proceeds of the letter of credit are to be used by Seaboard only to satisfy claims under bonds written for Eastern, and (b) Seaboard must first exhaust the proceeds of the letter of credit before taking advantage of any alleged right to solicit set offs.

Chase answered the complaint and cross-claimed against Seaboard (A. 340). Chase's cross-claim seeks judgment declaring that the proceeds of the letter of credit are to be

* A. refers to the designated pages of the Joint Appendix.

used by Seaboard to satisfy only claims under bonds written by Seaboard for Eastern; requiring that Seaboard render an accounting to Chase for the proceeds of the letter of credit; and requiring that upon the satisfaction of its liability under bonds written by Seaboard for Eastern, Seaboard refund to Chase the amount drawn (\$2,000,000), less any amount paid by Seaboard under bonds written for Eastern and any unpaid premiums due Seaboard on bonds written for Eastern.

Defendants International Harvester Credit Corporation, Manufacturers, Fruehauf Corporation and Thomas H. Cahill, Trustee in Bankruptcy of Associated Transport, Inc. ("Associated"), also answered and asserted various defenses, cross-claims and counterclaims (A. 277, 304, 336, 394).

Seaboard did not answer, but instead moved to dismiss each of the three causes of action of the complaint and to obtain "an affirmative declaration sustaining the contentions made by Seaboard [as alleged by plaintiff] in paragraphs 24, 25 and 26 of the complaint" (A.262) to the effect that Seaboard was entitled to the right of set off (A. 345-346). Seaboard sought dismissal of the first and second causes of action of the complaint for failure to state a claim under Rule 12(b)(6), Federal Rules of Civil Procedure. Seaboard asserted that the third cause of action did not relate to property in the actual or constructive possession of the Bankruptcy Court, and therefore sought dismissal on the ground that the Bankruptcy Court lacked jurisdiction to grant the relief sought. For the same reasons, Seaboard also moved to dismiss parallel cross-claims asserted against it by Chase and other defendants (A. 371).

On April 7, 1977, the Bankruptcy Court (Babitt, J.) filed an opinion denying Seaboard's motion to dismiss the third cause of action and ordering an evidentiary hearing to be held to determine the proper allocation of the proceeds of letter of credit (A. 531). The Order of the Bank-

ruptcy Court, entered on May 27, 1977, *inter alia*, denied Seaboard's motion to dismiss the third cause of action for lack of jurisdiction, and similarly denied Seaboard's motion to dismiss Chase's cross-claim (A. 543-549). The Bankruptcy Court further ordered that the Eastern Trustee was entitled to declaratory relief with respect to paragraphs 24, 25 and 26 of the first cause of action to the extent that no right of set off could be claimed by Seaboard until the proceeds of the letter of credit were exhausted. Judge Babitt also ordered that a temporary restraining order entered previously be made permanent, thus enjoining Seaboard and its representatives from interfering with the administration of the Eastern estate and mailing letters to customers of Eastern inviting set offs of freight charges against cargo claims. Because of its rulings on the third cause of action, the Bankruptcy Court denied without discussion Seaboard's motion to dismiss the first cause of action. The evidentiary hearing to determine the proper allocation of the proceeds of the letter of credit was stayed pending appeal of Judge Babitt's order.

Seaboard appealed to the District Court. On October 31, 1977, the District Court (Palmieri, J.) by Opinion and Order affirmed the Order of the Bankruptcy Court (A.662-676).

Statement of the Facts

Prior to their bankruptcies, both Eastern and Associated (of which Eastern had acquired approximately 46% ownership in 1974) were licensed interstate motor carriers (A. 261, 355). Each was authorized to be a self-insurer for cargo losses sustained by shipper customers. Prior to 1974, Seaboard had issued bonds in connection with Associated's liability as a self-insurer to third-parties (A. 354).

In 1974, subsequent to Eastern's acquisition of its interest in Associated, Eastern also began to do business with Seaboard. On August 26, 1974, Eastern and Associated entered into an agreement with Seaboard whereby Eastern

and Associated agreed to furnish collateral to Seaboard in return for Seaboard's issuance of surety bonds covering potential liabilities to third persons for bodily injury, lost or damaged cargo, etc. (A. 359-362). On September 16, 1974, Eastern and Associated signed a "General Agreement of Indemnity" holding Seaboard harmless against any and all liabilities incurred by the issuance of such bonds (A. 363-367). Chase was not a party to either of those agreements.

On September 12, 1974, Eastern procured from Chase letter of credit No. 252636 for the benefit of Seaboard and for the account of Eastern up to an aggregate amount of \$2,000,000 (A. 269). The letter of credit provides that Seaboard could draw on the funds on sight draft accompanied by "Your [Seaboard's] written certification stating that you have not been released from liability under the surety bond(s) or undertaking(s) you have executed on behalf of Eastern Freightways Inc." (A. 269).

Subsequently, in August, 1975, Eastern granted to Manufacturers, for itself and as agent for other lenders (including Chase), security interests in accounts receivable of Eastern as well as all of Eastern's right, title and interest in and to interstate and intrastate operating rights, authorities, routes and related business (A. 260-261). The aggregate principal amount loaned pursuant to these arrangements was \$4,750,000 (A. 312). Additional security interests in the accounts receivable were granted subsequently to defendants International Harvester Credit Corporation and Freuhauf Corporation (A. 261).

On April 22, 1976, Eastern and Associated each filed Chapter XI petitions. On April 28, 1976, both were adjudged bankrupt.

On April 28, 1976, Seaboard presented to Chase the letter of credit, its draft for \$2,000,000 drawn under the letter of credit, and its written certification in accordance with the terms of the letter of credit (A. 302, 303, 487). Seaboard certified to Chase that it had not been released

from liability under the surety bonds or undertakings executed by it on behalf of Eastern (A. 303). On that day, Chase paid \$2,000,000 to the order of Seaboard under the letter of credit (A. 487). To the extent that Seaboard's liability on behalf of Eastern was satisfied without exhaustion of the \$2,000,000 drawn, the terms of the letter of credit provided the excess funds would be refunded to Chase (A. 269-270). Seaboard's accounting as of July 22, 1977, shows it has paid claims under the bonds or undertakings written on behalf of Eastern in the amount of \$257,769.14 (A. 651, 655).

However, Seaboard now contends that the proceeds of the letter of credit may be used to satisfy obligations incurred by Seaboard under bonds written for both Eastern and Associated, and in fact has been so using the proceeds of the letter of credit (A. 487).

Immediately after drawing down the proceeds of the letter of credit, Seaboard wrote to various shipping customers of Eastern and advised them that Seaboard, in its capacity as surety, would satisfy outstanding cargo claims only after those cargo claims had been offset against freight charges owed by the customers to Eastern (A. 19-20).

As a result, on September 21, 1976, the Eastern Trustee filed an application under Bankruptcy Rule 920 for an order adjudging Seaboard guilty of civil contempt and seeking an injunction prohibiting Seaboard from interfering with the Eastern Trustee's administration of the estate and with the assets and property of the estate, including the freight charges owed to Eastern. In particular, the Eastern Trustee sought to enjoin Seaboard and its agents from contacting shippers asserting cargo claims against Eastern and advising them that the sums owing to Eastern for unpaid freight charges should be deducted from the cargo claims. At the time of filing the complaint, the Eastern Trustee represented that it was his belief that the realizable value of the accounts receivable and operating rights assigned by Eastern as collateral to secure the loans made by Manufacturers was far in excess of that indebtedness (A. 261).

Hearings were held by the Bankruptcy Court on October 14, 21 and 26 on the Eastern Trustee's motion (A. 91-251) and a temporary restraining order was issued restraining Seaboard from continuing its letter-writing campaign to Eastern's customers (A. 272-276). In the course of the hearings, the parties, including Seaboard, agreed that an adversary proceeding would be commenced in which Seaboard, the Eastern Trustee, Chase and the claimants to the accounts receivable would be parties and that the proceeding would dispose of all of the rights of the parties in dispute, including the issue of the allocation of the letter of credit (A. 123-132; 158-163; 222-223; 240-241; 250), and disgorgement by Seaboard of any proceeds to which it was not entitled (A. 123-124). As a result of that agreement, the pleadings and motions which have given rise to this appeal were filed.

ARGUMENT

I

The District Court Correctly Affirmed the Bankruptcy Court's Decision that Seaboard Had No Right of Set Off Until it Exhausted Those Proceeds of Chase's Letter of Credit Properly Allocable to Cargo Claims Against Eastern.

Both the Bankruptcy Court and the District Court distinguished the facts of this case from the facts of *In re Yale Express System, Inc.* 362 F.2d 111 (2d Cir. 1966), and held that Seaboard had no right of set off at least until the proceeds of the letter of credit properly allocable to cargo claims against Eastern were exhausted. The District Court said:

"In refusing to consider this case governed by the principle articulated in *Yale Express*, the Bankruptcy Judge noted that

'[t]he exception [the *Yale Express* doctrine permitting set offs] is bottomed on the fact that

without the right of set off, the surety would have no recourse against the insolvent principal and as a result the estate of the principal becomes enriched at the surety's expense.'

This appears to have been Judge L. Hand's reasoning in *Morely, supra*, a lengthy excerpt from which is quoted approvingly by Judge Friendly in the course of his opinion for the court in *Yale Express, supra*, at 115. Finding that the surety in the present case *does* have recourse—namely, the proceeds of the two million dollar letter of credit—and therefore that the principal's estate would not be enriched at the surety's expense, the Bankruptcy Judge concluded that it could not claim any right of setoff until such time as the proceeds of the letter of credit are exhausted.

"This conclusion was eminently correct." (A. 667-668)

* * *

"The trustee's right to prevent Seaboard from inviting setoffs and thereby interfering with assets in his constructive possession (the accounts receivable) arises, in part, from the availability to Seaboard of proceeds of a letter of credit. 'Availability' must not be understood in a physical sense, but rather in a legal one: the funds which impede Seaboard's alleged right to setoffs are only 'available' to it if, given the proper use of such funds, there remains a reservoir from which Seaboard can continue to draw in paying claims under its bonds. . . . What Seaboard has actually spent is thus not the question; the question is what Seaboard was entitled to have spent, given a proper interpretation of the contractual terms and associated instruments, and whether such authorized expenditures have exhausted the proceeds. This latter question, upon the resolution of which depend the rights of the parties as to the setoffs, requires an examination and interpre-

tation of the parties' rights in and to these proceeds, and in particular, a determination of whether such proceeds must be used solely to satisfy claims under bonds written by Seaboard for Eastern, as alleged in the complaint.

"It appears, then, that the Bankruptcy Judge properly assumed jurisdiction to decide these questions upon the scheduled evidentiary hearing." (A. 673)

The analysis of the *Yale Express* case by the Bankruptcy Court and the District Court was correct. The argument on this issue contained in Point IA of the Brief of Defendant-Appellee Manufacturers Hanover Trust Company ("Manufacturers' Brief") well sets forth the law and reason supporting the determination reached below. Pursuant to Rule 28(i), Federal Rules of Appellate Procedure, Chase adopts by reference Point IA of Manufacturers' Brief.

The decision of the courts below—that Seaboard must exhaust the proceeds of the letter of credit properly allocable to cargo claims against Eastern before Seaboard could claim a right to set off—equally can be sustained by the doctrine of marshalling of securities. This ground for sustaining the decision below is discussed in Manufacturers' Brief at Point IB, which is adopted here by reference pursuant to Rule 28(i), Federal Rules of Appellate Procedure. Application of the doctrine of marshalling of securities requires the existence of two funds from which a creditor may satisfy his debt. Here, those two funds are Seaboard's right (*arguendo*) of set off and those proceeds of the letter of credit properly allocable to cargo claims against Eastern. However, in order to determine the extent, and, indeed, the availability of the second fund (proceeds of the letter of credit properly allocable to Eastern), there must be a determination of the parties' rights to the proceeds of the letter of credit as has been ordered by the courts below.

II

The District Court Correctly Held that the Bankruptcy Court Has Summary Jurisdiction to Determine the Proper Allocation of the Proceeds of Chase's Letter of Credit.

Chase, plaintiff, Manufacturers, and other assignees of Eastern's accounts receivable contend that the letter of credit is available to Seaboard only in respect of cargo claims against Eastern (A. 340-343; 326-327; 226; 294-295). Seaboard and the Associated Trustee contend that the letter of credit secures Seaboard in respect of cargo claims against Eastern and Associated (A. 356-357; 399-400). The letter of credit provides in relevant part:

"We hereby authorize you to draw on The Chase Manhattan Bank N.A., New York, New York

By Order of The Chase Manhattan Bank, N.A., Branch No. 26 (Pennsylvania Branch)

And for account of Eastern Freightways Inc.
Eastern and Moonachie Avenues,
Carlstat, New Jersey 07072

Up to an Aggregate amount of TWO MILLION U. S. DOLLARS

Available by your drafts at sight accompanied by:

"Your written certification stating that you have not been released from liability under the surety bond(s) or undertaking(s) you have executed on behalf of Eastern Freightways Inc." (A. 269).

Seaboard contends (Br.* 29-30) that even if this Court should agree with the analysis of the Bankruptcy Court and the District Court of *Yale Express*, the Bankruptcy

* "Br." refers to the designated pages of appellant Seaboard's brief on appeal.

Court would still lack summary jurisdiction to determine the proper allocation of the proceeds of the letter of credit because those proceeds are in Seaboard's possession and subject to an adverse claim by Seaboard.

The summary jurisdiction of the Bankruptcy Court to determine the proper allocation of the proceeds of the letter of credit can be affirmed, as it was by the District Court, as a "necessary prerequisite to the final resolution of the rights of the parties with respect to the setoffs, over which the court clearly has jurisdiction" (A. 673). Summary jurisdiction of the question of the proper allocation of the proceeds of the letter of credit also can be affirmed because it is necessary to the administration of the estate, and on the basis of Seaboard's express and implied consent that the question of the allocation of the proceeds of the letter of credit be decided by the Bankruptcy Court.

A. Summary Jurisdiction of Interrelated Issues

Summary jurisdiction is conferred by either consent, Bankruptcy Act §§ 2a(7), 23(b), 11 U.S.C. §§ 11a(7), 46(b) (1970), or the Bankruptcy Court's actual or constructive possession of the subject matter of the controversy. 2 *Collier on Bankruptcy* ¶ 23.05[1] (14th ed. 1976). The Bankruptcy Court also has summary jurisdiction over those issues, not otherwise within its jurisdiction, which must be determined so that the issues clearly within its jurisdiction may be resolved. See, e.g. *James Talcott, Inc. v. Glavin*, 104 F.2d 851, 853 (3d Cir.), cert. denied, 308 U.S. 598 (1939); *In re Solar Manufacturing Corp.*, 200 F.2d 327 (3d Cir. 1952), cert. denied, 345 U.S. 940 (1953). This latter ground was the basis for the District Court's affirmation of the summary jurisdiction of the Bankruptcy Court. Judge Palmieri found that the set off issue could not be resolved finally until the legal availability of the proceeds of the letter of credit was determined (A. 673).

Seaboard contends that the District Court's decision greatly expanded the summary jurisdiction of the Bank-

ruptcy Court, so much so in fact, that plenary proceedings would be completely preempted (Br. 36). Seaboard's argument, if adopted, would prevent the Bankruptcy Court from considering issues necessary to the resolution of questions concededly before it with respect to Seaboard's asserted set off right. Unless the Bankruptcy Court determines the proper use of the proceeds, it will not be able to determine their availability as recourse; and unless that availability is determined, the Court will not know when the proceeds have been exhausted.

The law is clear that the Bankruptcy Court has summary jurisdiction to resolve an issue as to which it would not ordinarily have summary jurisdiction where the issue is necessary to the resolution of issues within the Court's summary jurisdiction. *James Talcott, Inc. v. Glavin*, *supra*, 104 F.2d at 853 (summary jurisdiction extends to "all questions relating to," and matters "interrelated" with, the original subject matter); see also *In re Dolly Madison Industries, Inc.*, 326 F.Supp. 441 (E.D.Pa. 1971); 2 *Collier on Bankruptcy* ¶ 23.08[5]. Summary jurisdiction which is based upon possession extends to "all...interests affecting the estate" and "all rights and claims pertaining" to the property in the Court's possession. 1 *Collier on Bankruptcy* ¶ 2.06; *Id.* at ¶ 23.04[2].

In this case, the issue as to the proper application of the proceeds of the letter of credit is so "closely connected", *James Talcott, Inc. v. Glavin*, *supra*, 104 F.2d at 853, with the issue of Seaboard's alleged right of set off against Eastern's accounts receivable as to be, in the words of the Bankruptcy Court, "inextricably intertwined" (A. 538). In the first cause of action, the Eastern Trustee asks for a declaratory judgment that Seaboard's alleged right of set off against freight charges owed to Eastern by cargo claims of Eastern's shipping customers, on which Seaboard is liable as surety for Eastern, is precluded by virtue of Eastern's assignment of its accounts receivable (A. 262). By its motion to dismiss, Seaboard asks for a declaratory judgment that it has an unfettered right to set offs against

Eastern's accounts receivable (A. 346). Before deciding the extent of Seaboard's right to set off, the Bankruptcy Court was required to determine whether Seaboard had any right to set off at all. Because a surety's right to set off is an equitable one, based upon his lack of recourse against a bankrupt principal, a decision on this question requires the Bankruptcy Court to determine the proper application of the proceeds of the letter of credit, which constitute a fund to which Seaboard may look for reimbursement. As the Bankruptcy Court noted, "The existence of the proceeds of the letter of credit is a matter which is crucial to the determination of the request for affirmative relief that Seaboard, by its own motion, places before the court." (A. 538).

In order to determine whether existence of the proceeds of the letter of credit would, as plaintiff argues, make it inequitable to allow Seaboard to set off, it is necessary to determine the exact size of the fund to which Seaboard may look for reimbursement. If the claims upon which Seaboard is liable as surety will exhaust the fund, then the equities (as subsequently determined by the Bankruptcy Court) may require that Seaboard be permitted to set off; however, if the proceeds exceed the claims, Seaboard must look to the fund for full reimbursement. Consequently, the dispute between Seaboard and plaintiff depends upon a determination as to how the proceeds should be applied, which is put in issue by the third cause of action. If the proceeds may be used by Seaboard to satisfy cargo claims which have been filed against both Eastern and Associated, the proceeds may be exhausted. On the other hand, if the proceeds properly are usable only for claims against Eastern, they may well be more than sufficient. As the Bankruptcy Court realized, "it is the letter of credit which is at the heart of the trustee's argument that Seaboard has no right to act as it has." (A. 538).

Because Seaboard's purported right of set off (the issue as to which it sought declarative relief) ultimately depends

upon a resolution of the question of the proper use of the proceeds of the letter of credit (to Eastern alone or to both Eastern and Associated), the Bankruptcy Court correctly described the issues as "inextricably intertwined" and the District Court held the issue of the proceeds to be a "necessary prerequisite" to the set off issue.

Not only does the controversy over set offs require for its resolution a determination of the proper allocation of the proceeds of the letter of credit, but the remedy granted by the Bankruptcy Court and affirmed by the District Court does as well. The Bankruptcy Court permanently enjoined Seaboard until further order of the Court from soliciting set offs by customers of Eastern (A. 548). That order was affirmed by the District Court (A. 668-669). The opinions and orders of the Bankruptcy Court and District Court make clear that the permanent injunction can be lifted only upon exhaustion of the proceeds of the letter of credit available in respect of claims against Eastern. Thus, not only the controversy, but also the remedy, requires resolution of the issue of the proper allocation of the proceeds of the letter of credit.

The cases upon which Seaboard relies to attack the jurisdiction of the Bankruptcy Court (Br. 32-33) are inapposite. In *Jaquith v. Rowley*, 188 U.S. 620 (1903) (cited at Br. 32), the surety's claim to the money it held was not directly related to an issue over which summary jurisdiction existed. Unlike the present case, in *Jaquith* the initial issue involving the surety was the issue as to which jurisdiction was challenged. In the present case, of course, Seaboard concedes that the set off question is properly within the court's summary jurisdiction. The allocation of proceeds issue comes before the court as a prerequisite to determination of the set off issue. Thus, *Jaquith* is clearly distinguishable.

Similarly inapposite is *In re Horgan*, 158 F. 774 (1st Cir. 1907) (cited at Br. 33), in which the only issue involv-

ing the surety was the very one over which jurisdiction was contested. Thus, *Jaquith* and *Horgan* do not control.

B. Summary Jurisdiction Necessary to the Complete Administration of the Estate

If Eastern accounts receivable, concededly property within the constructive possession of the Bankruptcy Court, suffer no set offs as a result of cargo claims, the estate will recover more funds (after payment of secured creditors) than if set offs occur as a result of the cargo claims. The benefit to the estate from the accounts receivable cannot be determined until the proper allocation of the proceeds of the letter of credit is determined. If the letter of credit will fully indemnify Seaboard, no set offs will occur. If not, set offs may occur. Thus, before the estate can be fully administered, the allocation issue must be determined.

Seaboard recognizes (Br. 38) that there is clear authority, such as *O'Dell v. United States*, 326 F.2d 451, 455-456 (10th Cir. 1964), that summary jurisdiction exists over issues not otherwise within the Court's jurisdiction which must be resolved before the estate of the bankrupt can be completely administered. Seaboard argues (Br. 39-41), however, that *Law Research Service, Inc. v. Crook*, 524 F.2d 301, 314 (2d Cir. 1975), has restricted that authority to reorganization and arrangement cases. While *Law Research* was an arrangement case, there is nothing in the decision that restricts the Bankruptcy Court's summary jurisdiction to resolve issues necessary to completing the administration of an estate. Rather, *Law Research* indicates that this Court favors "a liberal rather than niggardly view of the [bankruptcy] court's jurisdiction" (524 F.2d at 314).

Seaboard argues that summary jurisdiction should be declined here because non-bankruptcy issues will predominate (Br. 39). The cases Seaboard has cited (Br. 39-41) are inapposite. *Thompson v. Magnolia Co.*, 309 U.S. 478 (1940), involved a confusing and unsettled issue of state property

law. Two courts of appeals had attempted to resolve the question and had reached conflicting results. For this reason, the Supreme Court decided that the state court should resolve the issue. The present case does not, however, contain the same complications. The issue in the present case, i.e., the proper use of the proceeds of the letter of credit, is simple to resolve. Normal contract rules apply to the construction of letters of credit, *Venizelos, S.A. v. Chase Manhattan Bank*, 425 F.2d 461 (2d Cir. 1970), *Bank of United States v. Scitzer*, 233 App.Div. 225, 251 N.Y.S. 637 (1st Dep't 1931), and thus the parol evidence rule will apply. Because strict compliance with the express terms of the letter of credit is required, *Anglo-South American Trust Co. v. Uhe*, 261 N.Y. 150, 184 N.E. 741 (1933), the entire issue should be resolved solely by reference to the letter of credit itself. The problems of confusion that concerned the Court in *Thompson v. Magnolia* are, therefore, absent here.

Seaboard's other cases (Br. 39-40), *In re Wonderbowl, Inc.*, 456 F.2d 954 (9th Cir. 1972), and *In re Herz Importing Corp.*, 349 F.Supp. 1106 (S.D.N.Y. 1972), are equally inapplicable. In *Wonderbowl*, the question sought to be resolved in the summary proceeding was encompassed in an ongoing plenary action in which discovery already had been completed. Unlike the present case, therefore, an earlier and more complete resolution of the question was available in the plenary action. *Herz* involved an interpleader action unrelated to any other claims already within the court's summary jurisdiction.

Seaboard has also expressed concern that the Bankruptcy Court may have presented an appearance of institutional bias in favor of the Eastern Trustee's position (Br. 40). This concern, however, is far different from the problem faced in *In re Lehigh and Hudson River Railway Co.*, 468 F.2d 430 (2d Cir. 1972), which Seaboard cites to support its concern. In *Lehigh* the debtor was involved in a reorganization, and the court's duty was to keep the debtor alive during the proceeding. Here, the Bankruptcy

Court does not have any bias or even the appearance of bias because this case is a "straight bankruptcy" in which all assets will eventually be distributed to creditors.

C. Summary Jurisdiction by Consent

Although Seaboard argues (Br. 30) that the District Court rejected consent as a basis for summary jurisdiction over the allocation issue, the record is clear that the District Court did not pass upon the issue of consent. On this issue, the District Court said:

"Although there are assertions in the briefs that Seaboard expressly consented to jurisdiction over the proceeds by its pre-complaint statements before the Bankruptcy Court or its filing of a proof of claim in this action, these were not passed upon by the Bankruptcy Judge in resolving the jurisdictional issue, and this court is reluctant to consider them here for the first time." (A. 671)

The District Court, however, did go on to say that Seaboard's alleged implied "consent" to jurisdiction over the set off issue did not constitute consent to jurisdiction over the allocation issue (A. 671).

It is basic that summary jurisdiction can be conferred by consent. Bankruptcy Act §§ 2a(7), 23(b), 11 U.S.C. §§ 11a(7), 46(b)(1970). Once conferred, summary jurisdiction by virtue of consent attaches to "all the claims of the parties and for the enforcement of all their rights against each other." 2 *Collier on Bankruptcy* ¶ 23.08 [1]. Such consent, once given, cannot be withdrawn. *Id.*

Here, Seaboard has given both its express and implied consent to determination of the allocation issue in the Bankruptcy Court. The record and governing legal principles on consent are well presented in Point IIC of Manufacturers' Brief, which is adopted herein by reference

pursuant to Rule 28(i), Federal Rules of Appellate Procedure.

Because the District Court did not consider whether consent existed as a basis of summary jurisdiction over the allocation issue, it left in doubt pending further development of the litigation the question of whether the Bankruptcy Court could compel distribution of the proceeds of the letter of credit. The District Court said:

"Whether, after such hearing, the Bankruptcy Court would have jurisdiction to compel any particular use of the physical proceeds or issue any other orders which cannot directly be predicated on his jurisdiction over the setoff issue is another question. Because it is not yet clear just what additional matters the Bankruptcy Judge intends to reach in this case, and because some of the parties, including the Eastern trustee, have taken positions in their briefs apparently disclaiming any assertion of jurisdiction over the proceeds themselves, these questions must abide the further course of this litigation." (A. 673-674) (footnote omitted)

However, the record clearly supports consent as a basis for summary jurisdiction over the allocation issue. This adversary proceeding was commenced as the result of an on the record agreement of all parties. That agreement contemplated resolution of all issues outstanding, including allocation of the proceeds of the letter of credit and disgorgement by Seaboard of any such proceeds to which it was not entitled (A. 123-132; 158-163; 222-223; 240-241; 250). In the course of reaching that agreement, Seaboard's counsel said, among other things:

"MR. CHESER: I think it will help it a great deal. You will start your action and we will start to get a stipulation of facts as soon as we can. We are dealing with banks. If they have improperly gotten money the Court can order them to disgorge it, if we got what we

are not entitled to we are a financially responsible party and the Court can order us to disgorge it." (A. 123-124)

Once consent has been given to determination of an issue, all related aspects of the issue can be adjudicated. Thus, the Bankruptcy Court does have jurisdiction to compel Seaboard to refund to Chase any amounts remaining after the proceeds of the letter of credit have been applied as the Bankruptcy Court determines.

Conclusion

The decision below should be affirmed and the jurisdiction of the Bankruptcy Court to order a refund to Chase of excess proceeds under the letter of credit recognized.

February 28, 1978

Respectfully submitted,

MILBANK, TWEED, HADLEY & McCLOY
Attorneys for Defendant-Appellee
The Chase Manhattan Bank,
National Association
1 Chase Manhattan Plaza
New York, N. Y. 10005

Of Counsel:

RUSSELL E. BROOKS
TONI C. LICHSTEIN

STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

MICHAEL BRAUNSBURG, being duly sworn, deposes and
says:

I am over the age of 18 years and am not a party to
this action.

On February 28, 1978, I served the within brief on
the attorneys listed below by depositing two true copies
thereof securely enclosed in post-paid wrappers addressed to
each of such attorneys at their respective addresses in a
mailbox maintained by the Government of the United States at
1 Chase Manhattan Plaza, New York, New York:

Booth, Lipton & Lipton
405 Park Avenue
New York, N.Y. 10022

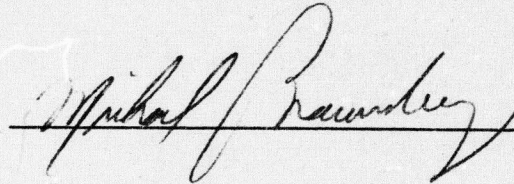
Marcus & Angel
60 East 56th Street
New York, N.Y. 10022

Krause, Hirsch & Gross
41 East 42nd Street
New York, N.Y. 10017

Wachtell, Lipton, Rosen & Katz
299 Park Avenue
New York, N.Y. 10017

Conboy, Hewitt, O'Brien & Boardman
20 Exchange Place
New York, N.Y. 10005

Anderson, Russell, Kill & Olick, P. C.
630 Fifth Avenue
New York, N.Y. 10020



Sworn to before me this
28th day of February, 1978.



ALTERIO A. COLETTI
NOTARY PUBLIC, State of New York
No. 03-4655093
Qualified in Bronx County
Certificate Filed in New York County
Commission Expires March 30, 1979